Filed 10/1/12 Dutta v. USC/Norris Cancer Hospital CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

SURESH V. DUTTA, Plaintiff and Appellant, v. USC/NORRIS CANCER HOSPITAL et al., Defendants and Respondents.	B231140 (Los Angeles County Super. Ct. Nos. BS126007, BS115670)

APPEAL from a judgment of the Superior Court of Los Angeles County. James C. Chalfant and Ann Jones, Judges. Affirmed.

Mazur & Mazur, Janice R. Mazur, William E. Mazur, Jr.; Ronald S. Marks for Plaintiff and Appellant.

Christensen & Auer, Jay D. Christensen, Anna M. Suda, Vicki C. Gadbois for Defendants and Respondents.

Plaintiff and appellant Suresh Dutta, M.D.'s medical staff membership and clinical privileges were terminated by defendants and respondents USC/Norris Cancer Hospital and USC University Hospital. Dutta appeals from a judgment denying his petition for writ of mandate to compel reinstatement of his staff membership and privileges. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Dutta is a physician and surgeon board certified in radiation oncology. USC/Norris Cancer Hospital and USC University Hospital (collectively, the Hospital) are medical centers based in Los Angeles.

In December 2003, Dutta submitted an application to the Hospital for employment and hospital staff privileges. Dutta's application was approved, and in May 2004 he was appointed to the provisional staff of the radiation oncology division and granted certain clinical privileges. He began working in the department of radiation oncology at USC/Norris Cancer Hospital.

In April 2005, the Hospital's medical executive committee (MEC) directed the credentials committee to investigate whether Dutta had provided incomplete and false information regarding his background and qualifications in his 2003 application. In the course of the investigation, the credentials committee found evidence that Dutta provided false information and failed to provide requested information in the application process. The MEC recommended that Dutta's clinical privileges and medical staff membership be terminated. Dutta denied the allegations and, pursuant to the Hospital's medical staff bylaws, requested a hearing.

In July 2005, Dutta was advised by letter that the hearing would be held in August 2005 and that neither Dutta nor the MEC would be represented by counsel at the hearing. Three Hospital-affiliated physicians were appointed to serve as the judicial hearing committee. The letter laid out five specific charges, each alleging that an omission or statement in Dutta's application process was "knowingly false and misleading."

Peter Rank, a "semi-retired" attorney, was appointed by the Hospital to act as hearing officer. Dutta, through his attorney, objected to the appointment of Rank, but Rank heard argument on the objection himself and overruled it.

The hearing commenced on August 8, 2006, and lasted for seven nonconsecutive days; the last day of hearing was in July 2007. Although both parties (the MEC and Dutta) were represented by counsel, neither side's attorney was permitted to attend or participate in the hearings. The attorneys were permitted to address legal issues with the hearing officer when the hearing was not underway, however.

Judicial hearing committee decision

The judicial hearing committee issued its written decision on August 7, 2007. The decision addressed the five charges brought against Dutta. The relevant charges[1] were: "**1.** In your 2003 application to the Medical Staff, you answered 'No' to the question: 'Has your professional school faculty position or membership ever been suspended, diminished or revoked?' [Question 13G.] That response was knowingly false and misleading. In fact, the Chairman of the Radiation Oncology Section of the University of Texas Southwestern Medical Center ('UTSMC') notified you on October 30, 2000 that you would not be reappointed to your faculty position at that facility for the following fiscal year and that you were placed on paid administrative leave at that facility from May 8, 2001 through August 31, 2001. These actions were reportedly based on your 'erratic, disruptive pattern of practice.' [¶] **2.** In your 2003 application for initial appointment to the medical Staff, you answered 'No' to the question: 'Have your privileges or status at any hospital, health care facility or practice organization ever been suspended, diminished, revoked not renewed, voluntarily or involuntarily relinquished?' [Question 13B.] That response was knowingly false and misleading. In fact, you were suspended and not renewed at UTSMC based on erratic and disruptive conduct. In addition, you were terminated from a position with Network Cancer Care LP in late 2001

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[1] Other charges were ultimately resolved in Dutta's favor and are no longer at issue.

or 2002 based on disciplinary cause. [¶] **3.** In an email message to the Medical Staff Office, dated February 27, 2004, you stated: 'There is a gap from September of 2001-December of 2001 when I traveled a lot of time with family. I had been considering a position to become director of a new private cancer center at that time, but the company that was recruiting me declared bankruptcy obviating that career path.' That statement was knowingly false and misleading. In fact, during the period September 1, 2001 through November 15, 2001, you were employed by Network Cancer Care LP and you were subsequently terminated from that practice for cause."

A majority (two of the three) physicians on the judicial hearing committee found charge 1 was true and that charge 2, as it related to UTSMC, was true. The committee unanimously found that charge 2, as it related to Network Cancer Care LP (NCC), and charges 3 through 5 were not supported by a preponderance of the evidence.

The judicial hearing committee, by a majority decision, approved the recommendation of the MEC that Dutta's staff membership and clinical privileges be terminated.

Administrative appeal to the appeal board

Both Dutta and the MEC appealed the judicial hearing committee's report to the Hospital's governing board, which appointed an appeal board. The appeal board heard oral argument on April 4, 2008.

The appeal board issued a written decision, which upheld the charges found true by the judicial hearing committee. In addition, the appeal board found that all the other charges were also true, and found that the judicial hearing committee's conclusion that certain charges were not true was unreasonable. The appeal board upheld the decision to terminate Dr. Dutta's staff membership and clinical privileges.

The Hospital's governing board thereafter adopted the appeal board's recommendation to terminate Dutta's clinical privileges and medical staff membership, and affirmed its modification of findings and conclusions against Dutta.

First petition for writ of mandate

On July 3, 2008, Dutta filed a petition for writ of mandate in the Superior Court for the County of Los Angeles seeking to have the decision terminating his medical staff membership and clinical privileges set aside. An administrative record and an abridged joint appendix were lodged with the trial court.

A hearing was held in June 2009 before the Honorable James C. Chalfant. On June 26, 2009, the trial court issued its written decision granting the petition in part. The trial court found that certain evidence—an affidavit by UTSMC's former chairman Dr. David Pistenmaa—which supported the "true" finding with respect to UTSMC in charges 1 and 2, was unauthenticated and hearsay and should not have been considered. The court affirmed the findings in charges 2 and 3 relating to NCC, but found that the findings of "true" as to charges 4 and 5 were not supported by substantial evidence.

The matter was remanded to the appeal board to either reconsider charges 1 and 2 without reference to the affidavit, or to conduct additional proceedings at which admissible evidence from Pistenmaa could be presented. On remand, the appeal board was also to consider whether, in light of the trial court's decision, Dutta's clinical privileges and medical staff membership should still be terminated.

Remand to the appeal board

After the matter was remanded, in January 2010 the appeal board issued a written recommendation affirming the prior decision to terminate Dutta's clinical privileges and staff membership. The board found that further evidence presented following remand was sufficient to render the Pistenmaa affidavit admissible, but that even if the affidavit was not considered, termination was still warranted. The written recommendation stated: "The violations by Dr. Dutta were extremely serious. The Hospital owes its patients a legal duty to exercise reasonable care in selecting and reviewing the competency of the independent physicians and surgeons who, as members of the Medical Staff avail themselves of the Hospital[']s facilities, but who are neither employees nor agents of the Hospital. The failure to insure the competency of the Medical Staff and the quality of medical care provided through the prudent selection, review, and continuing evaluation

of the physicians who are granted staff privileges leaves the Hospital vulnerable to liability for any resulting harm to patients. [¶] The obvious purpose of the questions on the application and at the hearings was to obtain the basis for determining whether a grant of privileges might have an adverse effect on patient care. Dr. Dutta answered . . . questions falsely and was guilty of misrepresentation; he committed a clear violation of his duty to the Hospital to be complete and accurate. His falsehoods, misrepresentations, and outright lies, made it impossible for the Hospital to perform its investigative duties as to a new applicant. Of course, Dr. Dutta knew exactly what he was doing—concealing problems he had had with other Medical Institutions."

The appeal board's recommendation was subsequently adopted by the Hospital's governing board.

Second petition for writ of mandate

In April 2010, Dutta filed a second petition for writ of mandate, and an administrative record was again lodged. On December 8, 2010, the trial court (Honorable Ann I. Jones) issued a ruling denying the petition.

This appeal followed.

DISCUSSION

Our review of this appeal is governed by Code of Civil Procedure section 1094.5 (section 1094.5). Pursuant to subdivision (b) of section 1094.5, we determine "whether there was a fair trial," and "whether there was any prejudicial abuse of discretion." "Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." (*Ibid.*) Furthermore, in a case such as this one that arises from a private hospital board, "abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in light of the whole record." (§ 1094.5, subd. (d).)

I. The Hearing Process

A. Peer review

The decision to terminate Dutta's clinical privileges and medical staff membership was effected through the process of peer review.

"Decisions concerning medical staff membership and privileges are made through a process of hospital peer review. Every licensed hospital is required to have an organized medical staff responsible for the adequacy and quality of the medical care rendered to patients in the hospital. [Citations.] The medical staff must adopt written bylaws 'which provide formal procedures for the evaluation of staff applications and credentials, appointments, reappointments, assignment of clinical privileges, appeals mechanisms and such other subjects or conditions which the medical staff and governing body deem appropriate.' [Citations.] The medical staff acts chiefly through peer review committees, which, among other things, investigate complaints about physicians and recommend whether staff privileges should be granted or renewed. [Citation.] In 1989, California codified the peer review process at Business and Professions Code section 809 et seq., making it part of a comprehensive statutory scheme for the licensure of California physicians and requiring acute care facilities . . . to include the process in their medical staff bylaws. [Citation.]

"The primary purpose of the peer review process is to protect the health and welfare of the people of California by excluding through the peer review mechanism 'those healing arts practitioners who provide substandard care or who engage in professional misconduct.' [Citation.] This purpose also serves the interest of California's acute care facilities by providing a means of removing incompetent physicians from a hospital's staff to reduce exposure to possible malpractice liability. [Citations.]

"Another purpose, also if not equally important, is to protect competent practitioners from being barred from practice for arbitrary or discriminatory reasons. Thus, [Business and Professions Code] section 809 recites: 'Peer review, fairly conducted, is essential to preserving the highest standards of medical practice' (*id.*, subd.

(a)(3)), but '[p]eer review that is not conducted fairly results in harm both to patients and healing arts practitioners by limiting access to care' (*id*., subd. (a)(4)). Peer review that is not conducted fairly and results in the unwarranted loss of a qualified physician's right or privilege to use a hospital's facilities deprives the physician of a property interest directly connected to the physician's livelihood. [Citation.]" (*Mileikowsky v. West Hills Hospital & Medical Center* (2009) 45 Cal.4th 1259, 1267-1268 (*Mileikowsky*).)

A loss of privileges can be severely detrimental to a physician's career. Business and Professions Code section 805, subdivision (b) requires that a hospital report a denial of staff privileges to the Medical Board of California. Additionally, a hospital generally must report disciplinary actions such as denial of privileges to a National Practitioner Data Bank. (*Mileikowsky*, *supra*, 45 Cal.4th at p. 1268.)

B. Selection of Rank as the hearing officer

A physician who is the subject of a private hospital peer review proceeding has the right to fair procedure. (*Kaiser Foundation Hospitals v. Superior Court* (2005) 128 Cal.App.4th 85, 102 (*Kaiser*).) Whether the peer review proceeding was conducted fairly is a question of law that we determine de novo on appeal. (See *Pomona Valley Hospital Medical Center v. Superior Court* (1997) 55 Cal.App.4th 93, 101.)

Business and Professions Code section 809.2, subdivision (b), provides that if a hearing officer is selected to preside at a peer review hearing, the officer shall not gain any direct benefit from the outcome, act as a prosecuting officer or advocate, or vote on the matter. Furthermore, Business and Professions Code section 809.6, subdivision (a), provides that parties to peer review proceedings "'are bound by any additional notice and hearing provisions contained in any applicable . . . medical staff bylaws which are not inconsistent with [the statutory peer review process].'" (*Mileikowsky*, *supra*, 45 Cal.4th 1259, 1274.)

Dutta contends that his right to fair procedure was violated because the selection of Rank as hearing officer resulted in an appearance of impropriety and a risk of temptation to favor the Hospital. In support of his argument, Dutta points out that Rank was initially suggested as one of several potential hearing officers by a lawyer for the

MEC, Jay Christensen, who was acquainted with Rank. The Hospital made the ultimate determination to appoint Rank, without any input from Dutta. Dutta contends that as a semiretired lawyer, Rank had a financial incentive to favor the Hospital in order to obtain future work as a hearing officer. Rank had "spread the word" that he was available to act as a hearing officer because it was a "good semi-retirement opportunity," and at the time of Dutta's hearing, Rank was involved with four other matters. Dutta claims that Rank revealed his bias by making several crucial evidentiary rulings that favored the Hospital.

Dutta's argument is largely based on the case *Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017 (*Haas*). In *Haas*, our Supreme Court considered whether certain counties' method of appointing hearing officers pursuant to Government Code section 27721 violated due process. The practice at issue involved the counties' selection of temporary administrative hearing officers on an ad hoc basis; the counties would pay the hearing officers according to the duration of work performed. The plaintiff, a massage parlor owner challenging the revocation of his license by a county board of supervisors, contended that the particular selection practice gave hearing officers "an impermissible financial interest in the outcome of the cases they are appointed to decide, because the officers' prospects for obtaining future ad hoc appointments depend solely on the county's goodwill and because the county, in making such appointments, may prefer those officers whose past decisions have favored the county." (*Id.* at p. 1020.) The Supreme Court agreed, finding that the practice was problematic because it gave rise to an objective appearance of possible impropriety— "[a] procedure holding out to the adjudicator, even implicitly, the possibility of future employment in exchange for favorable decisions." (*Id.* at p. 1034.) The Court was careful to limit the scope of its holding to the specific selection practice at issue, however. The decision stated: "We do not consider the constitutional validity of any rule or practice not presently before us." (*Id.* at p. 1036.) The Court also offered guidance to counties seeking to appoint administrative hearing officers: "To satisfy due process, all a county need do is exercise whatever authority the statute confers in a manner that does not create the risk that

hearing officers will be rewarded with future remunerative employment for decisions favorable to the county." (*Id.* at p. 1037.)

Two years later, the Sixth Appellate District extended the holding of *Haas* to a case involving revocation of a physician's hospital privileges through a peer review proceeding. *Yaqub v. Salinas Valley Memorial Healthcare System* (2004) 122 Cal.App.4th 474 (*Yaqub*) found that the circumstances by which the hearing officer was appointed brought the manner within the ambit of *Haas*. (*Yaqub*, at p. 484.) Because a person aware of the circumstances could reasonably doubt that the hearing officer could act with integrity, impartiality, and competence, and it was possible that the hearing officer could harbor a "temptation" to favor the hospital, the court found that the hearing officer should not have presided over the hearing, and reversal of the judgment revoking privileges was warranted. (*Id.* at p. 486.)

The trial court here found that, taking into account the particular circumstances surrounding the selection of Rank as hearing officer, the process was fair. We agree. Many of the factors supporting the finding of potential bias in *Haas* and *Yaqub* are not present in this case. The hearing officer in *Yaqub* had a long-standing relationship with the party hospital: he had previously served on the board of governors of a foundation that raised money for the hospital and was elected to that board by the hospital's own board of governors; he had served as a mediator and arbitrator in cases involving the hospital as a party; he had been engaged and paid by the hospital to act as hearing officer in at least two prior physician privileging matters; and he had been a presiding officer in the physician appellant's prior hearing. (*Yaqub*, *supra*, 122 Cal.App.4th at pp. 483-484.) In contrast, Rank had no prior affiliation with the Hospital or its medical staff, he had never served as a hearing officer or in any other capacity in a matter involving the Hospital, and he had no prior involvement with Dutta.

In *Haas*, the county acknowledged that it intended to continue appointing the hearing officer on an ad hoc basis in future matters. (*Hass*, *supra*, 27 Cal.4th at p. 1022.) Similarly, in *Yaqub*, because of the hearing officer's ongoing relationship with the hospital, it was reasonable to expect that he would continue to work on hospital-related

matters, and would face the temptation to rule in the hospital's favor to obtain future work. (See *Yaqub*, *supra*, 122 Cal.App.4th at pp. 484-485.) The lack of an ongoing relationship between the hearing officer and the Hospital here minimized that possibility. Furthermore, during voir dire, Rank stated that only 10 to 12 percent of his total income came from acting as a hearing officer and that he was not dependent on such income, a fact that further made it unlikely he would favor the Hospital in order to obtain future employment.

We also find it pertinent that the entity that initiated the peer review proceedings—the MEC—did not appoint Rank as hearing officer. Rather, pursuant to Hospital's medical staff bylaw 8.4-4, it was the Hospital administrator who made the appointment. According to bylaw 11.3-1, the MEC is comprised of medical staff. In the context of this case, it is important to recognize that "[h]ospitals have a dual structure. The administrative governing body, which might not include health care professionals, takes ultimate responsibility for the quality and performance of the hospital. The hospital's medical staff evaluates staff applications and credentials, appointments, reappointments, and assignments of clinical privileges." (*Mileikowsky*, *supra*, 45 Cal.4th at p. 1272.) The interests of a hospital's administrative governing body do not necessarily align with the interests of the medical staff. (See *ibid.*; *Smith v. Selma Community Hospital* (2008) 164 Cal.App.4th 1478.) The MEC—not the administrative governing board – was the party adverse to Dutta in the peer review proceeding overseen by Rank. Thus, the fact that Rank was appointed and paid by the Hospital was not likely to have any bearing on how he viewed the parties.

C. Business and Professions Code section 809.2, subdivision (c)

Dutta next contends that Business and Professions Code section 809.2, subdivision (c) (section 809.2, subdivision (c)), which allows the hearing officer to rule on objections to his or her own appointment, violates a physician's right to fair procedure. The statutory provision reads: "The licentiate shall have the right to a reasonable opportunity to voir dire the panel members and any hearing officer, and the right to challenge the impartiality of any member or hearing officer. Challenges to the impartiality of any

member or hearing officer shall be ruled on by the presiding officer, who shall be the hearing officer if one has been selected." (§ 809.2, subd. (c).)

Prior to the commencement of the original administrative hearing, Dutta objected to the selection of Rank as hearing officer. Dutta was allowed to conduct voir dire of Rank, both through correspondence and at hearing, and after responding to questions on the record, Rank denied Dutta's challenge. Dutta argues that this process was unfair because Rank should not have been allowed to rule on the question of his own bias.

Dutta cites to no authority addressing the propriety of section 809.2, subdivision (c). Instead, he relies on Code of Civil Procedure sections 170.6 and 170.3 and related authority pertaining to disqualification. One of the problems with Dutta's argument is that, by their terms, these provisions apply to judges of the superior courts, court commissioners, and referees. (Code Civ. Proc., § 170.5, subd. (a).) The Legislature indicated no intent to extend the provisions' reach to hearing officers in administrative proceedings. (See *County of San Diego v. Alcoholic Beverage Control Appeals Bd.* (2010) 184 Cal.App.4th 396, 406 [finding that Code Civ. Proc., § 170.6 did not apply to disqualification of an administrative law judge].)

In any event, putting aside the lack of direct statutory reference to hearing officers in sections 170.6 and 170.3, the setting in which those provisions apply is not analogous to a peer review proceeding, and there is no reason to presume the provisions would have any applicability to a peer review proceeding. The selection of a hearing officer at such a proceeding is merely optional; no hearing officer need be appointed at all. (Bus. & Prof. Code, § 809.2, subd. (b).) Furthermore, if appointed, the hearing officer may not vote on the merits (*ibid.*), and the hearing officer lacks independent authority to make dispositive rulings (*Mileikowsky*, *supra*, 45 Cal.4th at p. 1264). A hearing officer acts in the context of an administrative proceeding and—especially in a peer review proceeding—the hearing officer's role is clearly more circumscribed than that of a superior court judge or a referee.

In *Haas*, in the context of an administrative challenge to revocation of a business license, our Supreme Court held that "no generally applicable principle of constitutional

law permits the affected person in such a case to select the adjudicator." (*Haas, supra*, 27 Cal.4th 1017, 1031.) The court in *Kaiser*, applied this rule to the specific provision at issue here, section 809.2, subdivision (c), finding "it is evident that the Legislature intended to permit the unilateral selection of . . . a hearing officer by the peer review body," and that this sort of selection method does not violate fair procedure principles. (*Kaiser, supra*, 128 Cal.App.4th 85, 109.) It follows from these rules that a physician in a peer review proceeding, who does not have the right to choose the hearing officer, likewise does not have the right to unilaterally disqualify the hearing officer chosen by the peer review body. Instead, as occurred in this matter, the physician has the right to voir dire the hearing officer, and then challenge his or her impartiality if warranted. Dutta exercised these rights, and his challenge was properly denied.

D. In camera review of credential file

During the course of the initial hearing, Dutta requested that he be provided with copies of the entirety of his credential file. The MEC responded that it had produced to Dutta all relevant documents. After hearing argument from Dutta that he should be provided with the entire credential file, the hearing officer chose to conduct an in camera review of the file to determine whether any relevant documents had been withheld. Following this review, the hearing officer identified four documents in the credential file that were not produced. He ordered the MEC to turn them over to Dutta, and the MEC complied. Now, on appeal, Dutta argues that this in camera procedure was erroneous as a matter of law, and that Dutta should have been allowed to copy the entire credential file.

We find that the process employed by the hearing officer was acceptable under the circumstances. Business and Professions Code section 809.2, subdivision (d), provides: "The licentiate shall have the right to inspect and copy at the licentiate's expense any documentary information relevant to the charges which the peer review body has in its possession or under its control, as soon as practicable after the receipt of the licentiate's request for a hearing." This provision "was not intended to create a broad documentary discovery right." (*Unnamed Physician v. Board of Trustees* (2001) 93 Cal.App.4th 607, 630.) Furthermore, section 809.2, subdivision (d), gives the hearing officer the power to

"rule upon any request for access to information," and "impose any safeguards the protection of the peer review process and justice requires." Thus, under these provisions, Dutta was entitled to inspect and copy materials in his credential file that were relevant to the charges against him. The hearing officer had broad authority to impose safeguards on this process. The use of an in camera review to determine which documents were relevant was not improper. Dutta had no right to inspect or copy irrelevant documents, a result that would have been certain to occur if the entire credential file was turned over as requested.

Furthermore, even if a method superior to in camera review existed, Dutta has failed to establish any prejudice resulting from the review. "The erroneous denial of some but not all evidence relating to a claim [citations] differs from the erroneous denial of all evidence relating to a claim . . . . In the former situation, the appellant must show actual prejudice; in the latter situation, the error is reversible per se." (*Gordon v. Nissan Motor Co., Ltd.* (2009) 170 Cal.App.4th 1103, 1115.) Dutta has not identified any sort of relevant evidence that was not produced. He argues that he should have been able to obtain the entire file to determine if favorable documents were omitted from the file. There are two problems with this argument. First, Dutta has not identified any omitted documents and does not deny that relevant documents were produced. He does not explain how, if he reviewed the credential file that he contends may not have contained all documents, he would be able to identify any omitted documents, since he cannot do so now. Second, Dutta's argument fails to acknowledge that the charges against him were not based on his entire credentialing history, but instead on a few, discrete false statements made by him in the application process. Any glowing references that Dutta feels may have been missing from the credential file would not be relevant to determining whether false statements were made. Since there has been no showing that any relevant documents were not produced, Dutta's argument fails.

II. Whether the Findings Relating to UTSMC Were Supported by Substantial Evidence

Dutta next argues that substantial evidence did not supporting the findings that Dutta provided false answers to two application questions relating to UTSMC. These questions were numbers 13G—"Has your professional school faculty position or membership ever been suspended, diminished or revoked?"; and 13B—"Have your privileges or status at any hospital, health care facility or practice organization ever been suspended, diminished, revoked not renewed, voluntarily or involuntarily relinquished?" Dutta answered "no" to both of these questions. The MEC contended, and the judicial hearing committee and appeal board found, that these answers were false.

The preamble to question 13 in the application completed by Dutta stated that the questions pertained to "any action, including any investigation . . . which involves, denial, revocation, suspension, reduction, limitation, probation, non-renewal or voluntary or involuntary relinquishment by resignation, expiration, or withdrawal . . . of your medical staff or professional membership, privilege, licensure, certification, or status as a student in good standing." Section 5.5-2(a) of the medical staff bylaws further provides that by applying to the medical staff, each applicant "attests to the correctness and completeness of all information furnished." Moreover, Dutta signed a "Specific Consent to Condition of Consideration for Appointment and Reappointment" form, by which he affirmed that the information submitted in connection with the application was true and without omission to the best of his knowledge.

Several pieces of evidence supported the conclusion that Dutta's responses to both questions 13G and 13B were false. Dutta himself had filed a petition in a civil action in Texas against UTSMC's former chairman Dr. Pistenmaa, stating that "Dutta was systematically subjected to retaliation perpetrated by Pistenmaa, eventually leading to the non-renewal of Dutta's annually renewable contract which, as a result of Pistenmaa's tortious acts and retaliation, expired unrenewed on August 31, 2001. . . . Pistenmaa also took several other adverse actions against Dutta, including but not limited to the systematic stripping of his duties and responsibilities and denial of the privileges

associated with being an assistant professor in the Department of Radiation Oncology." During the course of the peer review proceeding, Dutta acknowledged that the words used in this petition were his own.

Other evidence included a completed form signed by Hak Choy, M.D., chair of radiation oncology at UTSMC, dated April 22, 2005. This form stated: "On October 10, 2000, the previous chairman advised Dr. Dutta that he would not be reappointed for Fiscal Year 2001-2002 as a result of his erratic, disruptive pattern of practice. He was placed on an administrative leave with pay on May 8, 2001 through August 31, 2001, as a result of his continuing erratic, disruptive pattern of practice." Although this statement was hearsay, it was properly considered in the proceedings against Dutta. Hearsay, so long as it is corroborated by reliable evidence, may support an administrative finding. (*Cipriotti v. Board of Directors* (1983) 147 Cal.App.3d 144, 155, fn. 2.) Further, the medical staff bylaws allow admission of hearsay "if it is the sort of evidence which responsible persons are accustomed to rely on in the conduct of serious affairs." Since Choy's statement was corroborated by Dutta's own statements in his petition against Pistenmaa and was the sort of hearsay evidence allowed by the bylaws, it could be considered to support the administrative findings.

Based on the foregoing evidence, we determine that the findings that Dutta made false statements in his application with respect to UTSMC were supported by substantial evidence. In his appellate briefs, Dutta misconstrues the language of questions 13G and 13B, as if the questions required an affirmative answer only if the applicant had suffered severe punishment due to proven malfeasance. It is not clear whether severe punishment was instituted against Dutta at UTSMC—it may or may not have been. But this issue is not relevant to whether the questions were answered falsely. A "yes" answer was required to question 13G if Dutta's professional school faculty position or membership was merely diminished. Likewise, a "yes" answer was required to question 13B if Dutta's privileges or status were merely diminished. The questions' preamble further clarified that any "action" or "investigation" involving a "limitation" of "medical staff or professional membership" or "privilege" was to be reported. Additionally, Dutta was

under the obligation to be correct and complete in his application. The evidence certainly supports a finding that by completely failing in his application to acknowledge his self-admitted loss of duties and responsibilities (not to mention privileges) at UTSMC, Dutta knowingly answered questions 13G and 13B falsely.

Thus, the admissibility of the Pistenmaa affidavit, an issue that Dutta repeatedly raises in his appellate papers, is not a matter we need resolve. The appeal board found that, even if it did not consider the Pistenmaa affidavit, termination of Dutta's medical staff membership and clinical privileges was warranted. We therefore decline to address this issue. (See *Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 259 [the court may decline to resolve matters that are unnecessary to the appeal].)

III. Whether the Findings Relating to NCC Were Proper

Dutta further contends that the true findings on charges 2 and 3 (relating to his affiliation with NCC) were improper. Initially, the judicial hearing committee found that these charges were not supported. The MEC appealed, and the appeal board reversed, finding that these charges were true.

A. The MEC's appeal

Dutta first argues that the MEC could not appeal the judicial hearing committee's adverse findings on these charges because the MEC was not an aggrieved party. In deciding the first petition for writ of mandate, the trial court correctly characterized this argument as "specious." Medical staff bylaw 10.7-1 states that after receiving the judicial hearing committee's decision, "either the affected practitioner or the body whose decision prompted the Hearing may request an appellate review by the Governing Board." As noted above, Business and Professions Code section 809.6, subdivision (a), provides for the establishment of medical staff bylaws not inconsistent with other statutory provisions pertaining to the peer review process. Bylaw 10.7-1 is not inconsistent with any such provisions. It provides that *either* the practitioner or the investigating body may request appellate review. By the terms of the bylaw, appellate review is not limited to aggrieved parties.

B. Appeal board determination on charge 2

We further find that the appeal board did not err by reversing the judicial committee hearing's finding that charge 2 was not supported as it related to NCC. Dutta checked the "no" box in response to application question 13B, asking "Have your . . . status at any . . . health care facility or practice organization ever been suspended, diminished, revoked not renewed, voluntarily or involuntarily relinquished?" The MEC contended that Dutta should have answered "yes" to this question because he had been terminated for cause from NCC. The judicial hearing committee found that Dutta did not need to reference NCC in his application because "his contract was improperly implemented by NCC (there was no NCC facility in which to treat patients . . .)." The appeal board correctly found the judicial committee hearing's finding on this issue to be unreasonable.

In a petition in a lawsuit filed by Dutta against NCC in Texas, Dutta stated that he commenced employment with NCC on September 1, 2001, and was terminated on November 8, 2001.[2] Dutta further stated that he fulfilled his requirements at NCC by practicing radiation oncology and performing other duties. Furthermore, according to the petition, NCC was required to provide Dutta "with a list of the names of every patient he treated or saw within one year of his termination. Though a list of patients was provided to Dr. Dutta, it was incomplete." Thus, contrary to the judicial hearing committee's determination, Dutta himself admitted that he treated patients while with NCC and that he was terminated by NCC.

In addition, in April 2005, in response to an inquiry, Odette Campbell, M.D., former owner of NCC, submitted a written statement that disciplinary action was taken against Dutta, and he was terminated for cause from NCC because of frequent absence from the clinic, tardiness, and patient mismanagement. Although Dutta contends that this written statement was hearsay, it was corroborated by the petition against NCC and so

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[2] In his application, Dutta was required to list previous practices. He did not list NCC.

could properly be considered. (See *Cipriotti v. Board of Directors*, *supra*, 147 Cal.App. 3d 144, 155, fn. 2.) Nor did the consideration of this written statement violate Dutta's asserted right to cross-examine witnesses. "The confrontation clause is a criminal law protection" that does not apply in administrative proceedings. (*Rosenthal v. Justices of Supreme Court* (9th Cir. 1990) 910 F.2d 561, 565; see also *Goodstein v. Cedars-Sinai Medical Center* (1998) 66 Cal.App.4th 1257, 1266 [hospital peer review proceeding is not a criminal proceeding]; *Medical Staff of Sharp Memorial Hospital v. Superior Court* (2004) 121 Cal.App.4th 173, 182 [accord].)

Since both of these pieces of evidence were properly considered, the appeal board did not err by determining that charge 2, as it related to NCC, was true.

C. Appeal board determination on charge 3

Charge 3 concerned a February 2004 e-mail from Dutta to the medical staff office in which he stated that there was a gap in his work history for the period of September 2001 to December 2001, when he traveled with his family. He further wrote: "I had been considering a position to become director of a new private cancer center at that time, but the company that was recruiting me declared bankruptcy obviating that career path."

As found by the trial court on the first petition for writ of mandate, this e-mail was clearly false. The trial court correctly summarized the issue as follows: "[Dutta] may have traveled and spent time with his family, but he also was employed by NCC. He clearly did not want to disclose his employment at NCC to the credentialing office because he knew he had been fired. The additional statement by Dutta in the email that he did not become employed by the company [NCC] because it went into bankruptcy is simply false. He was employed by NCC, and Dutta does not dispute that it declared bankruptcy until long after he had been fired. The email was a clear violation of his duty to be complete and accurate." (Fn. omitted.)

The appeal board, therefore, properly determined that charge 3 against Dutta was true.

IV. The Penalty of Termination Was Appropriate

Finally, Dutta argues that even if the findings were correct, they did not support the termination of his staff membership and privileges.

We disagree with Dutta's assertion. As noted by the appeal board, Dutta concealed problems he had with other medical institutions, making it impossible for the Hospital to adequately assess his suitability. Dutta agreed to complete the application truthfully and completely, but failed to do so. In his application, he further acknowledged that any significant misrepresentation, misstatement or omission, whether intentional or not, and even if discovered after privileges were already granted, would be cause for "summary dismissal." The termination of privileges and staff membership was clearly justified under the terms of the application and the Hospital's bylaws.

Dutta is also incorrect in his contentions that termination was disproportionate to the wrongdoing and that his failures had no relation to patient care. A nearly identical situation was addressed in *Ellison v. Sequoia Health Services* (2010) 183 Cal.App.4th 1486, 1498, in which a physician's medical staff membership and hospital privileges were terminated after it was discovered that he did not honestly and completely respond to questions about prior board certification examinations and his reasons for leaving a residency position. The court, finding that such untruthful behavior could jeopardize future patient safety, held: "A physician who conceals information about himself to protect his reputation might well withhold information about a case if it reflected negatively upon his skills as a practitioner. . . . '[I]t is absolutely vital that [a] physician be absolutely truthful in his or her application. Hospitals exist to help the sick and injured; they are not detective agencies. They should have the widest possible discretion in decisions affecting physician staff privileges.' (*Oskooi v. Fountain Valley Regional Hospital* (1996) 42 Cal.App.4th 233, 248-249 (conc. opn. of Sills, P. J.), fns. omitted)." (*Ellison*, at p. 1498.)

The importance of honesty and candor in the medical staff application process should be obvious. The application process is thorough for a reason—the medical staff has the obligation to select physicians who can meet the standard of care required. It can

reasonably be expected that a physician who subverts the crucial application process is likely to demonstrate a lack of candor in patient care as well. The termination of Dutta's staff membership and clinical privileges, therefore, was justified.

DISPOSITION

The judgment of the superior court denying the petition for writ of mandate is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

BOREN, P.J.

We concur:

DOI TODD, J.

ASHMANN-GERST, J.